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Opposition of America Online, Inc.  
CC Docket No. 96-45  
SBC Petition For Stay  
July 18, 1997

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

In the Matter of

Southwestern Bell, Pacific Bell, and  
Nevada Bell Joint Petition for Stay

CC Docket No. 96-45

**OPPOSITION OF AMERICA ONLINE, INC.**

America Online, Inc. ("AOL"), by its attorneys, hereby submits its Opposition to the Joint Petition for a Stay Pending Judicial Review ("Petition for Stay") of Southwestern Bell Telephone Company, Pacific Bell and Nevada Bell (herein "Joint Petitioners") filed July 3, 1997. For the reasons set forth herein, the Federal Communications Commission ("FCC" or "Commission") should reject the Petition for Stay and affirm the conclusions it reached in the Universal Service Order.<sup>1/</sup>

**INTRODUCTION AND SUMMARY**

Since its founding in 1985, AOL has played a leading role in the development of the Internet online medium to deliver information, entertainment, and communications for consumers around the globe. As the world's largest Internet Service Provider ("ISP"), AOL has a keen interest in ensuring that the market for the provision these services is robust and competitively neutral.<sup>2/</sup> To this end, AOL participated actively in the proceedings to implement the

<sup>1/</sup> In the Matter of Federal-State Board on Universal Service, CC Docket No. 96-45, Report and Order, FCC 97-157 (rel. May 8, 1997) ("Universal Service Order").

<sup>2/</sup> Today, AOL serves approximately 8 million members and provides local dial-up access in

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Telecommunications Act of 1996,<sup>3/</sup> including the universal service provisions of Section 254 that are the subject of the instant Petition for Stay.<sup>4/</sup>

Based upon the extensive record developed by the Federal-State Joint Board and the FCC, the statutory language of the 1996 Act, and the overarching policies the 1996 Act seeks to promote, the Commission should deny the Joint Petitioners' stay request, as the Joint Petitioners have not successfully met the legal requirements for the grant of a stay pending appeal.<sup>5/</sup> In the Universal Service Order, the FCC correctly concluded that it had ample legal authority for its decision and that the rules it adopted would serve the public interest. Contrary to the arguments raised in the Petition for Stay, therefore, Joint Petitioners are unlikely to prevail on the legal merits of their arguments. The Petition for Stay also fails to demonstrate irreparable injury, despite the Joint Petitioners' speculation about potential harms, and would likely detrimentally

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(continued)

roughly 700 cities worldwide. AOL provides consumers with original programming and informative content, e-mail and other capabilities, access to the World Wide Web and information databases, electronic magazines and newspapers, and opportunities to participate in online "chat" conferences. Together, these services offer an interactive community that enhances learning, personal communication, and productivity.

<sup>3/</sup> Pub. L. No. 104-104; 110 Stat. 56 (1996) ("1996 Act").

<sup>4/</sup> See In the Matter of Federal-State Board on Universal Service, CC Docket No. 96-45, Comments of America Online, Inc. (filed May 8, 1996); In the Matter of Federal-State Board on Universal Service, CC Docket No. 96-45, Ex Parte Presentation of America Online, Inc. (filed April 30, 1997); In the Matter of Access Charge Reform, CC Docket No. 96-262, Comments of America Online, Inc. (filed January 29, 1997); In the Matter of Access Charge Reform, CC Docket No. 96-262, Reply Comments of America Online, Inc. (filed February 13, 1997).

<sup>5/</sup> To obtain a stay, the moving party must show that: (1) it is likely to prevail on the merits; (2) it will be irreparably injured without a stay; (3) the issuance of the stay will not substantially harm other parties interested in the proceeding; and (4) the public interest will be served by the stay. WMATA v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977).

affect other parties if granted. Moreover, by interfering with the legitimate implementation efforts by the FCC of the 1996 Act, the grant of a stay would harm the public interest and impede the attainment of the benefits that Congress sought to promote. In short, however great the desire may be for Joint Petitioners to maintain the status quo wherein they alone can provide "universal services," the fact is that the 1996 Act contemplates a different scheme -- an environment of robust and vigorous competition in a competitively neutral setting that will bring "telecommunications," "advanced," and "information" services to schools, libraries and health care providers.<sup>6/</sup>

## ARGUMENT

### I. THE COMMISSION'S IMPLEMENTATION THE UNIVERSAL SERVICE PROVISIONS OF THE 1996 ACT IS LAWFUL

First, contrary to the assertions of Joint Petitioners,<sup>7/</sup> the 1996 Act clearly contemplates the provision of services other than "telecommunications services" to schools and libraries. Indeed, Section 254(h)(2) and the relevant legislative history refer expressly to "advanced telecommunications and information services."<sup>8/</sup> Thus, Congress affirmatively gave the Commission discretion to craft a different definition of universal service for schools, libraries and

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<sup>6/</sup> See 47 U.S.C. § 254(c)(3).

<sup>7/</sup> Petition for Stay at 6.

<sup>8/</sup> 47 U.S.C. § 254(h)(2)(A) (emphasis added); see also H.R. Conf. Rep. No. 104-458, at 133 (1996), reprinted in 1996 U.S.C.C.A.N. 124, 145 (stating that "new subsection (h)(2) requires the Commission to establish rules to enhance the availability of enhanced telecommunications and information services to public institutional and telecommunications users") (emphasis added).

health care providers.<sup>9/</sup> Moreover, contrary to the claims of the Joint Petitioners,<sup>10/</sup> the Commission's Universal Service Order does not sweep broadly with an open-ended definition of which services were contemplated by Congress. Instead, the FCC narrows even permissible Internet access services to reflect only basic "conduit" access to the Internet.<sup>11/</sup>

Second, the Commission has correctly implemented the provision true to Congressional intent and the explicit language of the 1996 Act in holding that ISPs that are unaffiliated with telecommunications carriers are eligible providers of broadband access to schools and libraries under Section 254 of the Act. While the Joint Petitioners may prefer an environment wherein only they are eligible to provide Internet access services to schools, libraries and health care providers, Section 254(h)(2) is designed to maximize choice for schools and libraries by allowing them to select from among the widest possible array of providers of access to advanced telecommunications and information services, including providers who are not "telecommunications carriers."<sup>12/</sup> This includes independent ISPs.<sup>13/</sup>

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<sup>9/</sup> 47 U.S.C. § 254(c)(3).

<sup>10/</sup> Petition for Stay at 11-12.

<sup>11/</sup> See Universal Service Order at ¶¶ 436, 444. In fact, the FCC was careful to limit, rather than expand, the services that could be included and therefore excluded other information services. Id.

<sup>12/</sup> See "Frequently Asked Questions on Universal Service and the Snowe-Rockefeller-Exon-Kerrey Amendment," FCC Public Notice, DA 97-1374 (rel. July 2, 1997) at 2-3.

<sup>13/</sup> See Universal Service Order at ¶¶ 589-96, 599; In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Recommended Decision, 12 FCC Rcd 87, ¶ 465 (1996), citing Joint Explanatory Statement, S.Conf. Rep. No. 104-230, 104th Cong., 2d Session at 132-133 (1996).

Critically, Section 254(h)(2) directs the Commission to establish “competitively neutral rules to enhance . . . access to advanced telecommunications and information services” for schools, libraries, and health care providers.<sup>14/</sup> Consistent with the mandate for competitive neutrality, eligibility for universal service support made available pursuant to Section 254(h)(2) is not limited to telecommunications carriers. As the FCC’s decision correctly recognizes, with the adoption of Section 254(h)(2), Congress recognized that the most efficient provider of access to advanced services may not be a telecommunications carrier. This mandate of competitive neutrality therefore ensures that any entity can compete to provide access to schools and libraries, regardless of whether it is a telecommunications carrier.

Significantly, while the Joint Petitioners make much of the rules of statutory construction,<sup>15/</sup> they ignore the fact that it is only Section 254(h)(2) that mandates competitive neutrality. Although it may not be to the Joint Petitioners’ liking, the fact is that the 1996 Act requires that only “telecommunications carriers” contribute to the support of universal service. Thus, Section 254(d) requires that “every telecommunications carrier” that provides interstate telecommunications services contribute to universal service funding.<sup>16/</sup> Because Internet access services are not telecommunications services, revenues from those services cannot be used to determine an entity’s universal service contribution. While the Joint Petitioners now argue that allowing non-contributors to receive universal service funding to fulfill the goals of the 1996 Act

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<sup>14/</sup> 47 U.S.C. § 254(h)(2) (emphasis added).

<sup>15/</sup> See Petition for Stay at 15-16.

<sup>16/</sup> 47 U.S.C. § 254(d). Section 254(b)(4) similarly refers to “providers of telecommunications services.”

is unfair since it is not “competitively neutral,”<sup>17/</sup> it was Congress itself that inserted its direction for competitive neutrality only in the subsection to which it intended it be applicable -- the provision of “advanced services.”<sup>18/</sup>

Further, the Joint Petitioners’ suggestion that the Commission’s implementation of Sections 254(c)(3) and 254(h) imposes an unconstitutional tax on providers of telecommunication services is also without merit.<sup>19/</sup> The Commission has historically authorized the use of both implicit and explicit subsidies to implement the goals of universal service, and these mechanisms have never been deemed a “tax.”<sup>20/</sup> For example, the current system of universal service subsidies consists principally of a number of implicit mechanisms designed to shift costs from rural to urban areas, from residential to business customers, and from local to long distance services.<sup>21/</sup> Inherent in these mechanisms is the notion that revenues may be collected in one area and then redistributed to another area. Just as such subsidies are not, and have never been, considered

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<sup>17/</sup> Petition for Stay at 19.

<sup>18/</sup> Had Congress intended for there to be “competitive neutrality” in the contribution requirement, it could have and would have specifically so provided by express language in Section 254(d).

<sup>19/</sup> Petition for Stay at 20-22.

<sup>20/</sup> Universal Service Order at ¶ 10.

<sup>21/</sup> Id. The Commission has implemented similar subsidy mechanisms without restrictions. For example, the Telecommunications Relay Services (“TRS”) rules require most carriers to contribute to a TRS Fund, which is then redistributed to TRS Providers who meet the specialized communications needs of individuals with hearing and speech disabilities. See 47 C.F.R. §§ 64.601-64.608. Like the Commission’s other universal service mechanisms, these TRS rules have never been found constitutionally impermissible.

“taxes” on telecommunication services, neither can the Commission’s new universal service framework.

The flaw in the Joint Petitioners’ argument is further evidenced by the legislative history of the 1996 Act. Specifically, although the Congressional Budget Office (“CBO”) indicated that “cash flows from external subsidies should appear on budget”<sup>22/</sup> in analyzing the universal service portion of the 1996 Act, the CBO stopped short of describing this system of subsidies as a “tax” on the provision of telecommunication services. More importantly, during the debate on the Senate floor, the conclusions of the CBO were reviewed and regarded as comporting with the view of Congress; namely, that universal service subsidies do not constitute a tax.

There is no way that this can be determined to be a tax. It is continuing the process that the industry itself started in the interstate rate pool. The interstate rate pool ... has never been included in the budget process. But because now we are limiting it, the [CBO] has decided that it ought to be referred to in the budget process ... The courts have held that the current universal service system is not a tax ... [The] CBO itself did not say it was a tax but said it had to be taken into account in the budget process... There is no intention here to make this bill a revenue-raising measure, and it is not one. It merely intends to modify the existing universal service concept in telecommunications.<sup>23/</sup>

Accordingly, the historical underpinnings of universal service and the legislative history of the 1996 Act demonstrate the erroneous nature of the Joint Petitioners’ claim that the Commission’s implementation of Sections 254(c)(3) and 254(h) constitutes an unconstitutional tax.

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<sup>22/</sup> Congressional Budget Office Cost Estimate, H.R. Rep. No. 104-204, at 69 (1995), reprinted in 1996 U.S.C.C.A.N. 10, 34.

<sup>23/</sup> 141 Cong. Rec. S7958-59, S8371 (daily eds. June 8, 1995 and June 14, 1995) (statements of Sen. Stevens).

For these reasons, the Joint Petitioners have failed to show that there is a likelihood that they will prevail on the merits of their claim. Moreover, because the injury that the Joint Petitioners assert will be caused to them by the Commission's Universal Service Order is theoretical rather than actual, and is not "certain and great,"<sup>24/</sup> the Joint Parties have not adequately demonstrated that they will suffer irreparable harm in the event that their Petition for Stay is denied. Third, grant of the Joint Petitioners' stay would prevent ISPs such as AOL from providing telecommunication services to schools, libraries, and health care facilities, would result in unlawful discrimination against service providers such as AOL, would harm the intended beneficiaries of the Universal Service Order, and would destroy any possibility of competitive neutrality. Finally, grant of the Joint Petitioners' stay would prevent schools, libraries, and health care facilities from choosing among a variety of competing service providers, thereby impeding the goals of the 1996 Act and harming the public interest.

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<sup>24/</sup> See Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1984). The Joint Petitioners broadly claim that they will lose customers, goodwill, and implicit support as a result of the Commission's Universal Service Order. Petition for Stay at 25-29. These claims are speculative at best and do not meet the standard of Wisconsin Gas Co., 758 F.2d at 674.



## CONCLUSION

Because the Joint Petitioners have failed to meet each of the four elements required to obtain a stay, the Commission should reject their Petition for Stay and affirm the conclusions it reached in the Universal Service Order.

Respectfully submitted,

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Dated: July 18, 1997

**CERTIFICATE OF SERVICE**

I, Cheryl S. Flood, hereby certify that on this 18th day of July, 1997, I caused a copy of the foregoing "Opposition of America Online, Inc." to be sent by messenger (\*) or by first class mail, postage prepaid to the following:

  
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